

The Administrative Law Judge denied respondent's request to assess liability against the Kansas Workers Compensation Fund. The respondent and insurance carrier request the Appeals Board review that denial.

The sole issue now before the Appeals Board is liability of the Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reason expressed below, the Award of the Administrative Law Judge should be affirmed.

Claimant began work for the respondent in the fall of 1989. Approximately four and one-half (4 1/2) months later, claimant began to experience symptomatology in her hands and wrists. Her symptoms gradually increased and she noticed her hands would be swollen in the morning and fatigued in the evening. Claimant believes her symptoms began in late January 1990. Other than fracturing her left arm in a car accident in 1980, claimant testified she had no prior problems with her arms or wrists.

Claimant worked for the respondent until March 27, 1990. On that date, claimant bumped her right arm and developed bruising and swelling. Claimant sought treatment and eventually saw Wichita orthopedic surgeon J. Mark Melhorn, M.D., who initially diagnosed tendinitis of the right wrist. Before her treatment was terminated, Dr. Melhorn operated on both of claimant's wrists and elbows to relieve carpal tunnel and ulnar nerve entrapment.

The respondent contends the Workers Compensation Fund should be liable for a portion of the lump sum settlement Award entered into with the claimant. Although it is unclear whether respondent contends claimant was impaired and handicapped before she began work for the respondent in 1989 or became handicapped after January 1990 when she began to experience symptomatology in her upper extremities, in either event the respondent has failed to establish its case against the Workers Compensation Fund.

K.S.A. 1989 Supp. 44-567 addresses the issue of apportionment of liability between the respondent and the Kansas Workers Compensation Fund. K.S.A. 1989 Supp. 44-567(a) provides:

"An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:

(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all

compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund.

(2) Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers' compensation fund."

K.S.A. 44-566(b) (Ensley) defines a handicapped employee as:

"... one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:

.....

17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

Should the respondent be relying upon the injuries claimant received in her car wreck in 1980, its claim against the Fund must fail. The Appeals Board finds claimant fractured her left arm in that accident, but she did not sustain any permanent physical injury or impairment. Claimant was never advised the car wreck caused her any permanent injury, nor did the injury impair her in any manner. When claimant began work for the respondent, she was not experiencing symptoms or problems with either upper extremity. In fact, claimant testified her arm symptoms had resolved approximately nine and one-half (9 1/2) years earlier.

Should respondent's claim be based upon the symptoms claimant developed in the upper extremities in January 1990, its claim against the Fund must fail for any one of the following three reasons. First, the evidence fails to establish claimant sustained more than one accidental injury during the period of January 1990 through March 1990. The Appeals Board finds the symptomatology claimant experienced during that period was part and parcel of one series of repetitive mini-traumas that resulted in compression of the median and ulnar nerves. Secondly, the evidence fails to establish it is more probably true than not that claimant was a handicapped employee before her last day of work on March 27, 1990. Thirdly, assuming claimant was a handicapped individual, which the Appeals Board

does not find, its claim against the Fund must fail because the respondent lacked knowledge of the alleged handicap.

Before liability can be assessed against the Workers Compensation Fund, the law requires the respondent prove some relationship between a preexisting impairment and the subsequent injury or ultimate disability. In the case at hand, the evidence fails to prove claimant possessed a preexisting impairment that in any way caused or contributed to a subsequent injury. Although Dr. Melhorn testified a twenty-five percent (25%) contribution existed between claimant's ultimate impairment and the symptoms for which claimant was evaluated by Dr. Edwards, the record is unclear whether Dr. Melhorn is referring to the symptoms from the 1980 car wreck or the symptoms claimant had when she last saw Dr. Edwards in May 1990 for right wrist complaints. Dr. Melhorn admits his opinion of contribution is speculative rather than based upon reasonable medical probability. Should Dr. Melhorn somehow believe the 1980 car wreck caused some type of permanent physical injury that has now been aggravated by claimant's work activities, the Appeals Board rejects that opinion as it appears unreasonable and not based upon the history of resolution of those temporary injuries.

The Appeals Board finds claimant was not a handicapped employee before her last day of work on March 27, 1990. Prior to her striking her arm on that date, claimant's symptoms were relatively minor. As claimant testified, she did experience swelling and fatigue in her hands during the period of January 1990 through March 1990, but was able to continue her work activities without significant difficulty. During that period, claimant did not seek medical treatment, nor did she voice complaints that would indicate she was injured or impaired. The only palliative measure claimant undertook during that time was to obtain wrist wrap from the respondent's supplies, an act which did not require respondent's permission. When the record is viewed as a whole, the evidence fails to establish that prior to March 27, 1990, claimant was a handicapped individual as defined by K.S.A 44-566(b) (Ensley), nor does it establish that respondent possessed knowledge of an impairment that constituted a handicap prior to claimant's last day of work.

The Appeals Board adopts the findings and conclusions of the Administrative Law Judge to the extent they are not inconsistent with those specifically set forth above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Floyd V. Palmer entered in this proceeding on June 30, 1994, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Michael C. Helbert, Emporia, KS
James R. Roth, Wichita, KS
Floyd V. Palmer, Administrative Law Judge
George Gomez, Director